In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-734

JULIO RIVERA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial with one Caraballo in the United States District Court for the Southern District of New York, petitioner was convicted of having aided and abetted the transfer by Caraballo of a quantity of cocaine hydrochloride not pursuant to a written order form, in violation of 26 U.S.C. 4705(a) and 18 U.S.C. 2.[1] On June 4, 1971, petitioner was sentenced to imprisonment for the mandatory minimum of five years. The court of appeals affirmed the conviction on October 7, 1971, without opinion. The petition for a writ of certiorari was not filed until November 30, 1971, and is out of time under Rule 22(2) of the Rules of this Court. In any event, the petition raises no issue warranting review.

[1] Caraballo was convicted of two substantive violations.

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On December 3, 1968, undercover agent Nargi was introduced to petitioner by a confidential informant of the Bureau of Narcotics and Dangerous Drugs (Tr. 169–170).[2] Nargi met with petitioner on at least three occasions between December 1968 and January 15, 1969. Each time the conversation related to the possibility of petitioner's introducing Nargi to someone who would sell Nargi cocaine (Tr. 182–186).

By prearrangement, on January 16, 1969, at about 1:15 p.m., Nargi met with petitioner at Greenwich Avenue and 12th Street in Manhattan. Petitioner promised to introduce Nargi to a seaman named "Ray" who would be able to sell him cocaine (Tr. 121–122, 182). At petitioner's direction, Nargi, another undercover agent, and petitioner drove to the National Maritime Union Hall on 13th Street where they parked. Stating that he was going to get "Ray" to introduce him to Nargi for the purpose of purchasing cocaine, petitioner entered the union hall alone (Tr. 122–123). A few minutes later petitioner returned to the car with co-defendant Caraballo; petitioner introduced him to the agents as "Ray" (Tr. 123). Both Caraballo and petitioner entered the agents' car, but petitioner left before any conversation about the sale of drugs took place (Tr. 188–189). Caraballo directed the agents to drive to "Little" West 12th Street; en route he told Nargi that he expected to receive a shipment of one kilo of cocaine which he could sell to Nargi for $20,000. Nargi

[2] "Tr." refers to the transcript of the trial testimony, a copy of which we are lodging with the Clerk of this Court.

stated that the price was high. The agent, however, agreed to purchase one ounce of cocaine on a future date (Tr. 124, 125, 130). As a sample, Caraballo then transferred to Nargi, without a written order form, a small white paper containing a white substance subsequently identified as 0.26 gram of cocaine hydrochloride (Tr. 125, 131, 133–135, 143; Gov. Exs. 2A, 2B, 4A). This constituted the basis for the convictions of petitioner and Caraballo under Count 1.[3]

Petitioner testified that he had met Nargi on the same day he introduced Nargi to Caraballo; that he had introduced the two men because Nargi wanted a connection for "something" which he never specified; and because Caraballo was standing nearby at the time (Tr. 307–308). Petitioner also denied knowing a person named Mario Ayuso and claimed that he had not met with Nargi and Mario on January 24, 1969 (Tr. 315–318).

In rebuttal, Nargi testified that on January 24, 1969, subsequent to the Caraballo introduction and sale, petitioner telephoned him to arrange a meeting with someone else who could sell cocaine. On that date, Nargi, petitioner, and a person called "Mario" met at 14th Street between 7th and 8th Avenues. In petitioner's presence, Mario offered to sell Nargi $600 worth of cocaine (Tr. 357–359). Upon defense objection to this conversation, the court instructed the jury as follows (Tr. 358–359):

> * * * I should tell you at this time, this is only being received as an alleged similar act of con-

[3] Caraballo was also convicted on Count 2, for selling cocaine to Nargi on the next day, January 17, 1969 (Tr. 126–130, 145).

> duct to be considered as to whether or not the defendant Rivera purposely, intentionally and deliberately facilitated or aided in the furtherance of the transaction as an aider and abettor by the introduction of Caraballo to the agent.

In its final charge, the court also repeated the substance of that instruction.

1. There is no merit to petitioner's contention that the evidence was insufficient to support his conviction as an aider and abettor (Pet. 6–9). In *Moses* v. *United States*, 220 F. 2d 166 (C.A. 3), relied on by petitioner (Pet. 8), the defendant who was a drug addict had waited at her apartment for the expected arrival of her narcotics supplier to whom she introduced the undercover agents after vouching for them. Finding that the defendant had no particular interest in whether or not a narcotics sale would be made, the court reversed the conviction for aiding and abetting. Here, on the other hand, petitioner, a non-addict, took an active part in the venture by speaking with agent Nargi on at least three occasions about introducing him to someone who would sell Nargi cocaine. Petitioner rode in the car with the agents to the Maritime Union Hall so that he could make the clandestine introduction to the actual narcotics seller, Caraballo. In light of his conduct, the jury could reasonably infer that petitioner knew Caraballo would transfer cocaine. Since petitioner had associated himself with the venture and sought by his actions to make it succeed, he was properly found guilty as an aider and abettor. *Nye & Nissen* v. *United States*, 336 U.S. 613, 619.

2. Petitioner contends that the trial court erred

in permitting agent Nargi to testify over defense objection that, subsequent to the sale charged in the indictment, petitioner introduced him to Mario who said he could sell Nargi cocaine for $600 an ounce (see Pet. 9–12). However, evidence of similar acts, including other crimes, either prior or subsequent to the crime charged in the indictment, is admissible when relevant for a particular purpose other than to show the accused's criminal character and where the probative value of the evidence outweighs its potential prejudicial effect. *United States* v. *Cuadrado*, 413 F. 2d 633, 635 (C.A. 2); *United States* v. *Deaton*, 381 F. 2d 114, 117–118 (C.A. 2); *United States* v. *Johnson*, 382, F. 2d 280, 2881 (C.A. 2). The evidence in this case which was inconsistent with petitioner's direct testimony and came in on rebuttal fell within this category. It was properly limited by the court's instruction as bearing upon petitioner's intent as an aider and abettor in introducing Caraballo to the agent (Tr. 358–359).[4] It is of no significance in the present context that there was no showing that a later cocaine sale was actually completed, since the evidence showed petitioner's criminal intent in attempting to arrange such a sale.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1972.

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[4] *United States* v. *Adams*, 385 F. 2d 548, 551 (C.A. 2), upon which petitioner relies (Pet. 11), recognizes that evidence of a planned but unconsummated narcotics sale is admissible, particularly in rebuttal, as showing an "accused's state of mind."

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